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No. 95-1726

In The

Supreme Court of the United States

October Term, 1996

UNITED STATES,

Petitioner,

v.

GEORGE LaBONTE, ALFRED LAWRENCE HUNNEWELL, AND STEPHEN DYER,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF FOR THE RESPONDENTS

On the Brief:
DAVID N. YELLEN
HOFSTRA UNIV. SCHOOL OF LAW
Hempstead, NY 11550
(516) 463-5957

JOHN A. CIRALDO
PERKINS, THOMPSON, HINCKLEY & KEDDY, P.A.
One Canal Plaza
P.O. Box 426
Portland, ME 04112-0426
(207) 774-2635
Counsel of Record for George LaBonte

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
Counsel of Record for Stephen Dyer

MICHAEL C. BOURBEAU
BOURBEAU & BOURBEAU, BONILLA & TOCCHIO, P.A.
50 Beacon Street, 4th Fl.
Boston, MA 02108
(617) 367-9695
Counsel of Record for Alfred Hunnewell

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QUESTION PRESENTED

Is the Sentencing Commission's design of the "career offender" guideline invalid under 28 U.S.C. § 994(h), if that guideline is a reasonable exercise of the powers and responsibilities that Congress delegated to the Commission in the Sentencing Reform Act as a whole?

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SUMMARY OF ARGUMENT

The Sentencing Reform Act delegates to the United States Sentencing Commission, not to the federal courts, the task of designing sentencing guidelines for "categories of offenders" who have committed federal crimes. Within that Act, § 994 of Title 28, United States Code, contains most of the directions Congress gave to the Commission concerning the design of the guidelines; that section includes dozens of directives, some expressed in broad philosophical terms and some relatively specific, all of which the Commission is charged with following.

No single provision of § 994 is intended to be implemented in disregard of the others. The balancing of statutory goals in the design of particular guidelines is at the heart of the task that Congress entrusted to the expertise of the Commission. The explicit decision by Congress to refer the matter of career offender sentences to the Sentencing Commission, rather than to mandate that courts impose sentences at or near the maximum in such cases, *see* S. Rep. No. 98-225, 98th Cong., 1st Sess. 175 (1983), reflects Congress's understanding that implementing § 994(h) requires balancing and harmonizing many provisions of law. Congress elected to give the Sentencing Commission significant flexibility in implementing harsh sentences for repeat offenders.

The design of § 994 as a whole reveals a clear congressional directive that the courts must defer to the Sentencing Commission's implementation of the Sentencing Reform Act's many potentially conflicting provisions. So long as any particular guideline can be explained as a reasonable implementation of the statute as a whole,

including, of course, any subsection of the Act that specifically relates to the matter addressed by the guideline in question, that guideline is not subject to judicial invalidation. The Commission's implementation of the mandate of § 994(h), calling for significantly increased sentences for "career offenders," including the definitional commentary to USSG § 4B1.1 added by Amendment 506, is entirely reasonable. That should end the matter.

For these reasons, this case does not call for resolution under the familiar two-part test of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). However, even under that test, the Sentencing Commission's actions are fully sustainable. The government contends that courts must disregard the definitional commentary to § 4B1.1 because it unambiguously violates 28 U.S.C. § 994(h). But because Congress has not "directly addressed the precise question at issue," 467 U.S. at 842, § 994(h) is not free from ambiguity within the meaning of *Chevron*. Because the Commission's implementation of that provision resolves those ambiguities in a reasonable manner that is consistent with the statutory command, the judgment below must be affirmed.

ARGUMENT

Introduction. The Sentencing Reform Act of 1984 created the United States Sentencing Commission and directed it to formulate sentencing guidelines for use by federal judges. *See* Pub. L. 98-473, tit. II, ch. II, 98 Stat. 1987 (*codified at* 18 U.S.C. §§ 3551 *et seq.* and 28 U.S.C. §§ 991-998) ("the Act"). In the Act, Congress included

dozens of mandates and suggestions to guide the Commission in fulfilling this formidable assignment. Among these is an instruction requiring that the guidelines call for sentences for certain "categories of" repeat offenders that are "at or near" the "authorized" statutory maximum. 28 U.S.C. § 994(h). In compliance with this directive, the Commission promulgated a guideline, USSG § 4B1.1, mandating severe penalties for "career offenders," defined as defendants at least eighteen years old who have been convicted for at least the third time of either a crime of violence or a controlled substance offense.

A defendant who qualifies as a career offender is automatically placed in Category VI, the highest under the guidelines.[1] A career offender's offense level is the greater of (1) the level obtained by applying chapters two and three of the guidelines, or (2) the level drawn from a table set forth in § 4B1.1. That table sets the offense level based on the "offense statutory maximum" for the current offense. Thus, if that maximum is ten years, the offense level is deemed to be 24, producing a guideline range (assuming no further adjustment or departure) of

[1] Chapter 4, part A, of the guidelines sets forth the rules for determining an offender's criminal history category. These rules measure the frequency, recency and severity of the defendant's prior criminal conduct. The defendant receives between 1 and 3 "points" for each prior conviction that the guidelines do not exclude. (For example, certain older convictions are excluded; *see* USSG § 4A1.2(e).) The total number of points determines the criminal history category, from I (little or no prior record) through VI (extensive record). This category then forms the horizontal axis of the guidelines' sentencing table. *See* USSG ch. 5, pt. A.

100-125 months' imprisonment; likewise, for a statutory maximum of 20 years, the level is 32, with a range of 210-262 months.

As originally adopted in 1987, § 4B1.1 did not contain a definition of the phrase "offense statutory maximum." This lacuna raised questions in cases where the statutory maximum applicable to a certain category of defendants was enhanced for one or another reason. For example, federal drug offenders with a record of a prior "felony drug offense," as currently defined in 21 U.S.C. § 802(43),[2] may be subject to an enhanced maximum, but only if the prosecutor seeks that exposure by invoking the notice and procedural provisions of 21 U.S.C. § 851. In commentary accompanying § 4B1.1, adopted in 1994 as Amendment 506 to the guidelines, the Sentencing Commission defined "offense statutory maximum" to mean "the maximum term of imprisonment authorized" for the offense of conviction "not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." USSG § 4B1.1, comment., appl. note 2; USSG, appx. C, amend. 506.[3] Under the definitional commentary

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[2] At different times since the adoption of 21 U.S.C. § 841 in 1970, the kind of prior conviction necessary to trigger an enhanced maximum term has varied somewhat. *Cf.* 21 U.S.C. § 802(12) (defining "drug"), § 802(13) (defining "felony" differently from its usage in subsection (43)).

[3] Other "career offenders" are subject to enhanced maximum terms for the offense of conviction based on entirely different reasons not affected by Amendment 506: for example, where death results from the commission of a drug offense, 21 U.S.C. § 841(b), or where the offense occurs within 1000 feet of a

added by Amendment 506, every "career offender" sentence is extremely harsh and represents an enormous enhancement over what would otherwise be the guideline sentence.

I. THE UNITED STATES SENTENCING GUIDELINE FOR "CAREER OFFENDERS," AS CLARIFIED BY AMENDMENT 506, IS NOT SUBJECT TO JUDICIAL INVALIDATION, BECAUSE IT IS A REASONABLE EXERCISE OF THE POWERS AND RESPONSIBILITIES CONGRESS DELEGATED TO THE SENTENCING COMMISSION IN THE SENTENCING REFORM ACT.

Congress granted the Sentencing Commission "significant discretion in formulating" the sentencing guidelines. *Mistretta v. United States*, 488 U.S. 361, 377 (1989). Section 994(h) is not an exception to but rather part of this legislative design. Congress required the Sentencing Commission to implement § 994(h) not in isolation but rather in the full context of the Sentencing Reform Act's many interrelated goals. The Commission responded by developing USSG § 4B1.1 and then by refining its implementation through Amendment 506. A review of the relevant statutory provisions demonstrates that the Commission fulfilled its mandate in an entirely reasonable manner. The government's challenge to the "career offender" guideline therefore must fail.

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highway truck stop, 21 U.S.C. § 849, or when a deadly weapon is used in a crime of violence, *e.g.*, 18 U.S.C. § 2113(d), or when certain crimes of violence result in injury or death. *E.g.*, 18 U.S.C. § 242.

A. Section 994(h) Requires the Sentencing Commission To Balance Complex and Competing Policy Considerations.

More than a decade of congressional efforts to change fundamentally the nature of federal criminal sentencing culminated in the Sentencing Reform Act of 1984. The Act's central reform was creating the Sentencing Commission and charging it with drafting sentencing guidelines that would have the force of law. *Mistretta v. United States*, 488 U.S. 361, 367-68 (1989). In § 994 of Title 28, the Act sets forth the Sentencing Commission's many duties. The provisions of § 994 declare a number of congressional goals and principles, and give the Sentencing Commission both guidance and structure. They do not, however, set forth precise policy prescriptions. To the contrary, the provisions of the Act are broad in nature and express a variety of potentially conflicting goals. This approach reflects Congress's recognition of the complex, multi-faceted task it was delegating to the Sentencing Commission and the Act's broad grant of authority to the Commission.

Some examples illustrate the scope and intricacy of the Sentencing Commission's task. Congress directed the Sentencing Commission to "promote" simultaneously several of the traditional purposes of punishment: retribution, deterrence, incapacitation and rehabilitation. 28 U.S.C. § 994(f). At the same time, the Commission is directed under § 994(a) to act consistently with 18 U.S.C. § 3553, another part of the Sentencing Reform Act, which requires sentencing judges both to follow the guidelines in most cases, *id.* § 3553(b), and to impose sentences

"sufficient, but not greater than necessary, to comply with" these same purposes of punishment. *Id.* § 3553(a).

The Commission is required to pay "particular attention" to "providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C. § 994(f). The Act sets forth factors the Sentencing Commission must consider in categorizing offenses, *id.* § 994(c), and offenders, *id.* § 994(d). The Act promotes the use of imprisonment for certain categories of repeat or violent offenders, *id.* §§ 994(h)-(j), and discourages the use of imprisonment for the purpose of rehabilitation, *id.* § 994(k), or for nonserious first offenders, *id.* § 994(j). The Act also directs the Sentencing Commission to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . . . " *Id.* § 994(g).

In order to fulfill the complex task delegated to it, the Sentencing Commission had to make numerous sensitive policy judgments, many of which required the fashioning of compromises. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988). The Commission had to address a variety of crucial issues on which the Act was essentially silent, such as whether to base sentences on the offense of conviction or on the defendant's "real offense." *See* Breyer, *id.*, at 8-12 (describing compromise reached); David Yellen, *Illusion, Illogic and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 422 (1993) (Congress provided "little or no statutory guidance" on this question).

In addition, the Sentencing Commission sometimes had to select between competing goals expressed in the

Act. Policies that further one goal of the Sentencing Reform Act often create tension with efforts to achieve another goal. For example, the Sentencing Commission's decision generally to require terms of imprisonment for first offenders convicted of tax and antitrust offenses, *see* USSG §§ 2T1.1, 2R1.1, may exacerbate prison overcrowding and undermine Congress's desire to discourage imprisonment for nonserious first offenders. Or, as will be discussed more fully below, basing increased sentences for repeat offenders on prosecutorial strategy decisions in individual cases would conflict with the goal of reducing unwarranted sentencing disparities. The Act gives the Sentencing Commission no guidance as to how to resolve the internal tensions within the Act on such questions.

That Congress intended the Sentencing Commission to make such subtle, sophisticated policy judgments in the guidelines' treatment of repeat offenders is evidenced by the existence of § 994(h) itself. Most significantly, Congress's intentions concerning repeat offenders are framed not as a directive to *sentencing courts*, as originally proposed, but rather as part of § 994's general policy instructions *to the Commission*. The importance of this shift in focus is illuminated by the legislative history of § 994(h). The Senate Report on the Sentencing Reform Act describes the background and rationale of § 994(h) as follows:

> Subsection (h) was added to the bill in the 98th Congress to replace a provision proposed by Senator Kennedy enacted in S. 2572, as part of proposed 18 U.S.C. 3581, that would have mandated a sentencing judge to impose a sentence at

> or near the statutory maximum for repeat violent offenders and repeat drug offenders. The Committee believes that such a directive to the Sentencing Commission will be more effective; the guidelines development process can assure consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 175 (1983). Congress thus consciously chose to ask the Sentencing Commission to set policies concerning repeat violent and drug offenders with all of § 994's directives in mind, recognizing and preferring that the Commission have and exercise more flexibility than would be available under a directive to sentencing courts.

Congress could have chosen to constrain the Sentencing Commission's choices more narrowly. When Congress wishes to dictate a specific sentence for a given category of offenders it can do so precisely, as it has done on many occasions. For example, Congress has adopted legislation establishing mandatory minimum terms of imprisonment, notwithstanding the sentencing guidelines, on a number of occasions. *See, e.g.*, 21 U.S.C. § 841(b), 18 U.S.C. § 924(c). Congress has also on occasion expressly directed the Sentencing Commission to make specific changes in the guidelines. *See, e.g.*, Act of Dec. 23, 1995, Pub. L. 104-71, §§ 2-4, 109 Stat. 774 (directing Sentencing Commission to increase the offense level for sexual exploitation of children). These tools were at Congress's disposal both when § 994 was enacted and when the Sentencing Commission adopted Amendment 506 and transmitted it for congressional review. Congress's

silence on both occasions plainly bespeaks the broad discretion Congress intended to vest in the Sentencing Commission in implementing § 994(h).

B. The Sentencing Commission Carefully Weighed Its Competing Obligations in Promulgating Amendment 506.

It is against this background that the Sentencing Commission drafted the career offender guideline and declared, in Amendment 506, that "offense statutory maximum" refers to the unenhanced maximum, whenever an enhancement is based on the existence of a prior conviction. In making this judgment, the Sentencing Commission had to consider not only the language of § 994(h), but also all the other provisions in § 994; indeed, the guidelines are explicitly required to be consistent with "all pertinent provisions of this title and title 18, United States Code." 28 U.S.C. § 994(a). Thus, for example, the Sentencing Commission was obliged under § 994(g) to consider the impact of a career offender guideline on prison overcrowding and under § 994(a), adopting the command of 18 U.S.C. § 3553(a), to consider whether the career offender provision would require judges to impose sentences that were "greater than necessary" to achieve the legitimate purposes of punishment. Nothing in § 994(h) suggests that the Commission is to create a "career offender" provision "notwithstanding any other provision of law," as some statutes read. *Compare* 18 U.S.C. § 3559(c)(1) ("three strikes" sentence).

The Sentencing Commission was also obliged to formulate the career offender guideline in a way that would

reduce unwarranted sentencing disparity. Reducing such disparity "among defendants with similar records who have been found guilty of similar criminal conduct," 28 U.S.C. § 991(b)(1)(B), was a cardinal goal of the Sentencing Reform Act. *See* S. Rep. No. 98-225, 98th Cong., 1st Sess. 38-39, 41-46, 49, 52 (1983). This Court has recently recognized the overriding importance of this aspect of the guidelines system: "The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice." *Koon v. United States*, 518 U.S. --, 116 S.Ct. 2035, 135 L.Ed.2d 392, 422 (1996).

Minimization of unwarranted disparity was not only important in the initial design of the guidelines but is also of continuing concern. Judge Wilkins, former Commission Chair, has elaborated on this theme:

> No purpose was more important to Congress and the several Administrations that worked for years to enact the Sentencing Reform Act of 1984 than the avoidance of unwarranted disparity and resulting unfairness in the sentencing of similarly situated defendants. This noble goal, about which there is virtual unanimous agreement in principle, was one that Congress recognized would be constantly in tension with a changing body of sentencing law. The SRA therefore provided that the Sentencing Commission would function as a permanent, auxiliary agency in the Judicial Branch, and it mandated the Commission to amend the sentencing guidelines as necessary to promote the goal of reasonable sentencing uniformity.

William W. Wilkins & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 87 (1993). In discussing § 994(n), authorizing the Commission to amend the guidelines, the Senate Report states, "Perhaps most importantly, this provision mandates that the Commission constantly keep track of the implementation of the guidelines in order to determine whether sentencing disparity is effectively being dealt with." S. Rep. No. 98-225, 98th Cong., 1st Sess. 178 (1983). *See also* 1 U.S. Sent. Comm'n, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* 161-66 (1991).

The goal of reducing unfair disparity is emphasized and restated as a mandate in another provision of § 994:

> The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

28 U.S.C. § 994(f). In § 994(f) Congress recognized that the various goals of the Act might have to be balanced in the process of designing the guidelines and directed that in doing so the Commission pay "particular attention" to the goal of reducing disparities.

The Commission identified reduction of unwarranted disparity as a principal rationale for Amendment 506. 59

Fed. Reg. 23,609 (1994); USSG, appx. C, amend. 506, *codified at* USSG § 4B1.1, comment., appl. note 2.[4] As the Commission recognizes, unwarranted sentencing disparity can arise from the exercise of judicial or prosecutorial discretion, even when that discretion is exercised in a perfectly lawful manner. The widespread existence of unwarranted sentencing disparity as a result of the exercise of lawful judicial discretion was a primary impetus for the enactment of the Sentencing Reform Act itself. In Amendment 506, as in a number of other instances,[5] the Sentencing Commission focused on the

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[4] Other rationales were also mentioned. One was a simple error, and the government, quite properly, makes nothing of it. *See* Pet. Br. 23 n.10. The other, elimination of a kind of "double counting," is more defensible. As the government admits, the Commission's construction of § 994(h) does in fact reduce the extent of the "double counting" effect. Pet. Br. 26 n.11. But whether Amendment 506 serves its stated goals effectively is not the point; that argument is addressed to the wrong audience. The issue here is this: it is for the Commission, not for the courts, to design the guidelines (including the career offender provision) in light of a balancing of all of Congress's policy objectives.

[5] For example, the Sentencing Commission recognized that one of the problems with a sentencing system principally based on the charges of conviction is that the prosecutor can greatly influence sentences through charging decisions. *See* USSG, ch. 1, pt. A(4)(a); Yellen, *supra*, 78 Minn. L. Rev. at 414-15. The "relevant conduct" guideline, USSG § 1B1.3, and the multiple count rules in chapter 3, part D, were designed, in part, to address this concern. *See* USSG, ch. 1, pt. A(4)(a). In addition, the Sentencing Commission suggested that courts should address "inappropriate manipulation of the indictment" by departing from the guidelines. *Id.*

dangers of unchecked prosecutorial discretion. The enhanced statutory maximums in 21 U.S.C. § 841(b)(1), (b)(2) and (b)(3) apply only when the government chooses to file the required information under *id.* § 851. This leads inexorably to inconsistent application of the enhancements.[6] As designed by the Commission, the

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A related problem is that a prosecutor could seek to have a sentence enhanced based on criminal conduct beyond the offense of conviction, and then later prosecute the defendant for that other conduct. *Cf. United States v. Witte*, 515 U.S. --, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995) (prosecution for conduct that has already been considered in imposing sentence for a previous conviction is not double jeopardy). In such circumstances, the guidelines require a concurrent sentence. *See* USSG § 5G1.3(b).

[6] The Sentencing Commission's concern with inconsistent application of the enhancement provisions is validated by a recent study done by Commission staff. Based on a random 20% sampling of "career offender" cases from a recent two-year period, the study found that the government had sought a sentence enhancement by filing an information pursuant to 21 U.S.C. § 851 in only 2.5% of eligible cases. *See* Memorandum from Pamela G. Montgomery, Deputy General Counsel, to Chairman Conaboy, U.S. Sentencing Comm'n (Sept. 30, 1996) (copy lodged with the Clerk). *See also* U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 57 (August 1991) (prosecutors usually decline to seek enhanced penalties for defendants based on existence of prior convictions). It appears then that while in some jurisdictions prosecutors rarely, if ever, rely on 21 U.S.C. § 851 to invoke the enhanced penalties against "career offenders," in other districts prosecutors seek enhancement in cases involving even relatively minor offenses. The discussion of respondent Dyer's case in text & nn. 11-13 below provides an example. This is precisely the sort of disparity that the Sentencing Commission is charged with addressing and mitigating.

career offender provision operates to reduce unwarranted disparity by ensuring an identical sentencing range for similarly situated defendants, regardless of whether the prosecutor has chosen to seek an enhanced statutory maximum.

The Act requires the Commission to design a "career offender" guideline not only in compliance with § 994(h) but also within the context of the guideline system as a whole. Accordingly, for example, the Commission makes available to career offenders the two or three level reduction for "acceptance of responsibility" that is available to any other category of offender. USSG § 4B1.1 n.*. Likewise, the Commission decided to place in the same "category" defendants whose instant offenses carry statutory maximums within a certain range – including placing all those exposed to a statutory maximum of 25 years or more, but less than life, at offense level 34, with a guideline range (before acceptance of responsibility) of 262-327 months. As a result of each of these Commission judgments, and particularly in cases where both come into play, the guideline range for many career offenders can include sentences well below the statutory maximum, however defined.

The Sentencing Commission also integrated § 4B1.1 into the structure of the rest of the guidelines in other ways that demonstrate its faithful implementation of § 994(h) within the context of the Act as a whole. A court is "encouraged" to consider departing below the guideline

range[7] pursuant to USSG § 4A1.3 (p.s.) if a defendant's career offender status over-represents the seriousness of the defendant's past criminal conduct or the risk of recidivism.[8] A court can also depart above the guideline range set by § 4B1.1 in an appropriate case. Finally, if a routine application of the guidelines yields a longer sentence than that called for by § 4B1.1, as it may, for example, in a case involving a gun-toting leader of a ring that trafficked in large quantities of drugs (and in other, less extreme cases), the longer sentence applies.[9]

By these mechanisms, the Sentencing Commission ensured a reduction, not only in unwarranted sentencing disparity, but also in unwarranted uniformity. Under the guideline as clarified by Amendment 506, a defendant who is more culpable because of factors such as a larger quantity of drugs in the offense, the use of a weapon, or a leadership role in the offense, can receive a longer guideline sentence than another offender who, although also subject to an enhanced maximum, has actually committed

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[7] This Court recently discussed "encouraged" and "discouraged" departures in *Koon v. United States*, 518 U.S. --, 135 L.Ed.2d 392, 116 S.Ct. 2035, 2045 (1996).

[8] *See, e.g., United States v. Lindia*, 82 F.3d 1154, 1164-65 (1st Cir. 1996); *United States v. Shoupe*, 35 F.3d 835 (3d Cir. 1994) (citing total of six other circuits).

[9] In each of the latter two types of cases, the prosecutor's filing of an information under 21 U.S.C. § 851 will permit a significantly longer sentence than might otherwise be authorized. The government is therefore mistaken in suggesting that the Commission's implementation of § 994(h) through Amendment 506 has the effect of nullifying an act of prosecutorial discretion authorized by Congress. *See* Pet. Br. 27-29.

a less serious offense. The government's position would force both categories of offenders to the same sentence "at or near" the enhanced maximum, seriously undercutting the Sentencing Commission's efforts at providing "certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C. § 994(f).

The government does not object to the integration of § 4B1.1 into the guidelines as a whole, thus implicitly recognizing the Commission's authority to exercise discretion in structuring the career offender guideline. In fact, the government has defended the Commission's discretion in formulating § 4B1.1 on other occasions. The government has supported the Commission's inclusion of conspiracy convictions within § 4B1.1's "career offender" rule, even though § 994(h), by its terms, does not cover conspiracies. (Section 994(h) cites specific statutory provisions that do not include the drug conspiracy laws, 21 U.S.C. §§ 846, 963; Pet. Appx. 114a.) *See, e.g., United States v. Hightower*, 25 F.3d 182 (3d Cir.), *cert. denied*, 115 S.Ct. 370 (1994); *United States v. Fiore*, 983 F.2d 1 (1st Cir. 1992), *cert. denied*, 507 U.S. 1024 (1993).[10]

The facts of respondent Dyer's case well illustrate the kind of disparate use of the career offender provision

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[10] Conversely, in seeming contradiction of its position in this case, the government opposes the interpretation of those Circuits which have invalidated the Commission's inclusion of conspiracy offenses within the scope of the "career offender" provision. *See, e.g., United States v. Bellazerius*, 24 F.3d 698 (5th Cir.), *cert. denied*, 115 S.Ct. 375 (1994); *United States v. Price*, 990 F.2d 1367 (D.C.Cir. 1993); see also *United States v. Mendoza-Figueroa*, 28 F.3d 766 (8th Cir. 1994), *rev'd*, 65 F.3d 691 (8th Cir. 1995) (in banc), *cert. denied*, 116 S.Ct. 939 (1996).

with which the Commission could properly be concerned. When sentenced in 1992 to serve over 20 years' imprisonment on a charge of conspiring to possess glutethemide with intent to distribute,[11] Dyer was 41 years old, with a lengthy arrest record, all related to his addiction to prescription cough medicines. PSI at 1, 6-20, 23-24. Only one of his prior convictions was for a "felony drug offense" – trafficking in glutethemide (the kind of substance to which he was addicted) in 1988, for which he served a 2½-year state sentence. PSI ¶78. This also qualified under USSG § 4B1.1 as a "career offender" drug conviction predicate. The second predicate, a so-called "crime of violence," was a nine-year-old commercial "burglary" conviction for which he had served about a year's imprisonment. PSI ¶52.[12] Yet because the prosecutor

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[11] As noted just above (text & n.10), in at least two circuits this conspiracy conviction would not even qualify as a trigger for career offender sentencing. The facts of this "conspiracy" are that respondent Dyer sold and mailed prescription pain killers from Florida to a friend in Maine who was suffering from the degenerative and fatal disease, Huntington's Chorea. The buyer, his friend, was charged and convicted as the sole co-conspirator (and was sentenced to a year's probation). Dyer PSI, at 2-3, 5; Mem. of Sent. Judgment, *U.S. v. Toppi*, Crim. No. 92-40 (D.Me.), at 2.

[12] Despite the use of this offense having been upheld on direct appeal, *United States v. Dyer*, 9 F.3d 1, 2 (1st Cir. 1993) (per curiam), this conviction was *not*, in fact and law, for a "crime of violence," as defined in USSG § 4B1.2(1). His was a commercial burglary (if it was a "burglary" at all; see *Taylor v. United States*, 495 U.S. 575 (1990), while only "burglary of a dwelling" is covered by the guideline definition, along with any offense involving "conduct that presents a serious potential risk of physical injury to another." USSG § 4B1.2(1)(ii) & appl. note 2. According to the police reports, this "burglary" consisted of

chose to file an information under § 851, the government now claims a sentence "at or near" 30 years was mandatory, rather than the sentence within a guideline range of 210-262 months that the Commission's rules would call for.[13]

The Sentencing Commission has entirely fulfilled Congress's intention that it assure that repeat offenders receive very substantial terms of imprisonment. In Respondent Dyer's case, for example, application of § 4B1.1, *including* Amendment 506, would replace an otherwise applicable sentencing range of 18-24 months with a range of 210-262 months, a more than ten-fold increase.[14] In sum, the Sentencing Commission carefully

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Dyer's entering a store that was open for business, and (finding the pharmacy department closed) using a screwdriver he picked up from a store shelf to jimmy open the door to that area, from which he picked up two bottles of cough syrup. When spotted by a store employee Dyer put the bottles and screwdriver down on a shelf and walked out.

[13] Actually, the government appears to be satisfied with the sentence of 262 months that was imposed (from a range of 262-327 months), although this is 98 months (more than eight years) shy of the 30 year maximum term triggered by the § 851 notice. How the government considers a 262-month term to be "at or near" 30 years, when it claims that a sentence chosen from a range of 210-262 months would not be, is not explained in its brief.

[14] Dyer had an offense level of 8 and was in Criminal History Category VI. Mem. of Sent. Judgment, Cr. No. 92-40 (D.Me., filed Dec. 11, 1992), at 1, 3; *see* USSG ch. 5, pt. A. Had he not failed to appear for sentencing when originally scheduled, his score could have been reduced another 2 levels for "acceptance of responsibility," USSG § 3E1.1, for a final level of 6, with a guideline range of only 12-18 months, even assuming

constructed § 4B1.1 and Amendment 506 to implement § 994(h), while complying as well with all of the other directives Congress included in the Sentencing Reform Act.

C. The Sentencing Commission's Decision to Adopt Amendment 506 Is Entitled to Great Deference.

The Sentencing Reform Act requires that the Sentencing Commission's treatment of "career offenders," reflecting a careful balancing of the policies set forth in § 994, be afforded great deference. Properly understood, the language and structure of § 994 reveal that its provisions were intended by Congress to provide an intelligible set of guiding principles to the Sentencing Commission. Section 994 does not serve as a basis for exacting judicial scrutiny of specific policy decisions reached by the Commission, much less as a justification for selective judicial revision of the guidelines in individual cases, as the government's position here implies. Put another way, while mandatory minimums and statutes increasing guideline offense levels are "rules statutes," and thus entitled to strict enforcement, § 994 is a "goals statute" that provides great autonomy to the Sentencing Commission.[15]

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no downward departure under USSG § 5K2.11 (p.s.) on account of his altruistic purpose in committing the offense. *See* note 11 *ante*.

[15] "Some statutes, to be called 'goals statutes,' announce goals and authorize delegates to promulgate controls on conduct in furtherance of those goals. 'Rules statutes,' on the other hand, state rules of conduct." David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 U.C.L.A. L. Rev. 740, 751 (1983).

Several factors weigh in favor of substantial judicial respect for the Sentencing Commission's judgments. First, unlike some regulatory statutes, which are born out of legislative distrust of agency discretion (*see* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 445 (1989)) the Sentencing Reform Act was enacted specifically to give substantial authority to the Sentencing Commission. Congress transferred authority to the Commission that had previously been exercised by individual sentencing judges and by Congress itself, and vested the Commission with broad discretion.[16] See generally *Mistretta v. United States*, 488 U.S. 361 (1989). Second, the concern that is sometimes expressed about deferring to agencies that both interpret and enforce the law (*see* Sunstein, *supra*, at 446) is not applicable to the Sentencing Commission, because the Commission has no enforcement authority and does not adjudicate cases.

This is not to say that Congress had no interest in the provisions the Sentencing Commission eventually adopted. To the contrary, Congress ensured that it would maintain an unusual degree of oversight over the Commission's work. Congress mandated in the Sentencing Reform Act that the initial guidelines and any subsequent amendments promulgated by the Sentencing Commission be submitted to Congress six months prior to the provisions' effective date. 28 U.S.C. § 994(p). This "report and

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[16] Indeed, the Act vests the Commission with broad power – which it has mainly declined to exercise – to "establish sentencing policies and practices for the Federal criminal justice system," 28 U.S.C. § 991(b)(1), apparently beyond the enterprise of designing and refining the sentencing guidelines.

wait" procedure was intended to enable Congress to review the Commission's work and, if appropriate, amend or override new guidelines by legislation. This Court highlighted the importance of this review period in rejecting a separation of powers challenge to the Commission in *Mistretta*, 488 U.S. at 393-94.

Congress has used its authority to oversee the Sentencing Commission's work in various ways. When the initial guidelines were promulgated in 1987, both Houses of Congress held hearings examining the proposed guidelines. See *Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice of the H.Rep. Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987). The House of Representatives considered, but rejected, a proposal to delay the implementation of the guidelines. *See* 134 Cong. Rec. E 604 (1988) (noting rejection of bill by House of Representatives on October 6, 1987). More recently, when Congress was displeased with Sentencing Commission amendments concerning certain narcotics and money laundering offenses, Congress passed legislation, which the President signed, rejecting the Commission's proposed amendments. Act of Oct. 30, 1995, Pub. L. 104-38, 109 Stat. 334.

This is the very process Amendment 506 went through. After adopting the amendment, the Sentencing Commission submitted it to Congress on April 28, 1994, with an effective date of November 1, 1994. 59 Fed. Reg. 23,608 (1994). Although the "report and wait" procedure, by its terms, is applicable only to guidelines and not to amended commentary, the Commission chose to call Amendment 506 to Congress's attention and to offer it up for possible disapproval. Given the opportunity to review

the amendment, Congress took no action, allowing Amendment 506 to take effect as scheduled. Thus, both in general and in this specific instance, § 994(p) operates to make judicial scrutiny of Commission decisions in the context of individual cases not only inappropriate but also unnecessary.

Nor does the directive or mandatory language utilized in many of § 994's subsections suggest that these provisions are judicially enforceable in the manner presumed in the government's brief. Some clauses state that the Sentencing Commission "shall" take some action. For example, § 994(f) states that the Commission "shall promote" the traditional sentencing purposes of just punishment, deterrence, incapacitation and treatment. Subsection (g) directs the Commission to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" and states that the sentencing guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . . . "

Despite the seemingly directive nature of these provisions, they have not been and should not be understood to impose narrow, specifically enforceable obligations on the Sentencing Commission. Several courts have rejected the argument that the Sentencing Commission's alleged failure to minimize prison overcrowding, even if true, entitles defendants to any form of relief, such as an invalidation of the guidelines or a departure from the guideline range. See, *e.g.*, *In re United States*, 60 F.3d 729, 733 (11th Cir. 1995) (claims that Sentencing Commission violated 28 U.S.C. §§ 994(g), (j) "have no bearing on whether the Guidelines as a whole or as applied in

McLellan's case are invalid; moreover, the claims are best brought to Congress' attention"), *cert. denied*, 116 S.Ct. 828 (1996). Rejecting a somewhat similar argument, the Tenth Circuit has also relied on the fact that § 994(g) is directed to the Sentencing Commission, not to the courts. *United States v. Ziegler*, 39 F.3d 1058, 1063 (10th Cir. 1994).[17]

Similarly, the instruction regarding the purposes of sentencing is so general and potentially self-contradictory as to yield little guidance. Nor should a court invalidate a guideline on the basis of a finding that the Sentencing Commission had failed adequately to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system," as required by § 994(o).

Subsections (c) and (d) of § 994 state that the Sentencing Commission "shall consider" and "shall" take into

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[17] Appellate courts have also rejected the argument that sentencing courts can ignore the guidelines because the recommended range calls for a sentence "greater than necessary" to comply with the purposes of punishment, in violation of § 994(a)'s mandate to design guidelines consistent with 18 U.S.C. § 3553(a). See *United States v. Deriggi*, 45 F.3d 713, 716 (2d Cir. 1995). To the extent that these cases suggest that one line of reasoning or another is unavailable as a basis for downward departure, however, they are not necessarily consistent with this Court's subsequent decision in *Koon, supra*. *See also* Gerald Bard Tjoflat, *The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel*, LV Fed.Prob., no. 4, at 4, 7 (Dec. 1991) (suggesting that counsel look to factors mentioned in § 994, to the extent *not* taken into account in the guidelines, as grounds upon which to argue for departures).

account, to the extent they are relevant, a litany of factors concerning the offense (*e.g.*, "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense") and the offender (*e.g.*, age, mental and emotional conditions, community ties). These provisions are clearly designed only to prompt Commission deliberation on those subjects, not to ensure any particular result.

A large number of provisions in § 994 state that the Sentencing Commission shall "assure," "ensure," or "insure" something. Section 994(h) is one of these. When viewed as a group, these provisions are no more specifically enforceable than the provisions just discussed. Instead, they reflect congressional guidance to the Commission but leave the Commission with significant discretion.

Section 994(e), for example, directs the Commission to "assure" that the guidelines "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant" in recommending a term of imprisonment or the length of such a term. Subsection (j) also seeks to "insure" the "general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." Subsection (m) tells the Commission to "insure that the guidelines reflect

the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense."[18]

To read these provisions, as well as subsections (k), (l) and (n), which also use the "assure," "insure," or "ensure" language, is to see why they are not the sort of provisions to be construed narrowly or in isolation. The phrases "general appropriateness" and "general inappropriateness" are too "general" to be meaningfully enforced. Congress is expressing policy preferences, but is giving the Commission broad latitude to implement those policies. No judicial review of the Commission's compliance with these provisions can be imagined that would not do violence to the independence Congress bestowed upon the Commission.

Implementing the language of § 994 requires careful analysis and subtle policy judgments. It is precisely this type of analysis and judgment that Congress intended the Commission to exercise, subject to congressional oversight and review. For a court to say, for example, that the Commission violated subsection (j) by improperly designating tax and antitrust offenses as "otherwise serious" and generally requiring prison terms for first offenders, or that it violated the same subsection by designating almost *no* offenses as "nonserious" so as to call presumptively for probation, would represent unwarranted judicial activism and interference with the Sentencing Commission's delegated authority.

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[18] Notably, Congress did not suggest in § 994(m) whether 1983-1984 (*i.e.*, "current") sentences were thought generally to be too severe, or too lenient, or sometimes one and sometimes the other and, if so, which were which.

Section 994(h) may appear, at first, to be more specific than some of the other provisions in § 994, and thus more susceptible to close judicial scrutiny in an individual case. When § 994(h) is read in context, however, the fallacy of this view is exposed. Subsections (h), (i) and (j) each addresses circumstances under which a term of imprisonment is appropriate. Subsection (j) establishes the "general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury." Subsection (i) seeks to have the Commission recommend a "substantial term of imprisonment" for several categories of defendants. And subsection (h) refers to "a term of imprisonment at or near the maximum term authorized" for what the Commission later labelled as "career offenders."

These provisions represent different points on a continuum, from some imprisonment, to a substantial term of imprisonment, to a term of imprisonment at or near the maximum. They differ in the strength of Congress's policy preference, but not in statutory structure or the legal effect of the language employed. The mandate of subsection (h) should not be viewed as specifically enforceable by a sentencing judge any more than the equivalent provisions of subsections (j) or (i) would be. Congress was certainly expressing an intention that repeat drug or violent offenders be subject under the Guidelines to severe sentences. However, these provisions do not represent the imposition of strict or precise constraints on the Commission, and certainly do not represent directives to the sentencing judge. It is also noteworthy that when the legislative history of the Sentencing Reform Act is consulted, the line between subsections (h),

(i) and (j) is further blurred. In discussing § 994(h), the Senate Report refers to "the Committee's view that *substantial* prison terms should be imposed on repeat violent offenders and repeat drug traffickers," S. Rep. 98-225, 98th Cong., 1st Sess. 175 (1983) (emphasis added), thus repeating the language from subsection (i) and apparently equating it with the substance of the mandate of subsection (h).

This Court recently recognized the Sentencing Commission's authority to exercise its discretion in implementing § 994(h). *Stinson v. United States*, 508 U.S. 36 (1993). Like this case, *Stinson* involved a Sentencing Commission interpretation of § 994(h) implemented through an amendment to guideline commentary. At issue in *Stinson* was the effect of Amendment 433, which amended the commentary to § 4B1.2 to state that the term "crime of violence," as used in § 4B1.1, does not include the offense of unlawful possession of a firearm by a felon. This Court concluded that:

> the commentary is a binding interpretation of the phrase "crime of violence." Federal courts may not use the felon-in-possession offense as the predicate crime of violence for purposes of imposing the career offender provision of USSG § 4B1.1 as to those defendants to whom Amendment 433 applies.

508 U.S. at 47.

Of course, the phrase "crime of violence" used in § 4B1.1 and defined in § 4B1.2 comes directly from § 994(h). It is part of the same "directive" to the Sentencing Commission as the phrase "at or near the maximum term." In defining "crime of violence," the Sentencing

Commission was limiting the potential reach of § 994(h). Notably, in upholding this action, this Court in *Stinson* did not independently construe § 994(h) to determine the intended meaning of "crime of violence." Instead, the Court deemed conclusive the Sentencing Commission's definition. *Stinson* firmly supports the Sentencing Commission's authority to determine how best to implement the policies expressed in § 994, and particularly to do so through its implementation of § 994(h).[19]

There is no indication that Congress intended to impose close judicial scrutiny on the Sentencing Commission's policy judgments and implementation of the Sentencing Reform Act. To the contrary, Congress intended to insulate the Sentencing Commission, to the extent possible, not only from political considerations, *see* Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 Calif. L. Rev. 1, 5, 7-16 (1991) ("The Commission is less politically accountable than virtually any other federal

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[19] The statement in *Stinson* that guideline commentary is binding unless it "violate[s] the Constitution or a federal statute," 508 U.S. at 45, is not inconsistent with this analysis. Of course, commentary, like a guideline, that conflicts with a statute is invalid. If a guideline called for probation for an offender convicted of an offense to which a mandatory minimum term of imprisonment was applicable, or for which probation was otherwise excluded by statute, the court would be required to ignore the guideline. The question in this case, though, is a different one: whether the Sentencing Commission's policy judgment in implementing Section 994(h) is a valid exercise of its discretion. Amendment 506 does not "violate . . . a federal statute" in the sense reserved in *Stinson*.

agency."), but also from distracting litigation. The legislative history of § 994 demonstrates that Congress intended that the Sentencing Commission's resolution of the multitude of tasks it faced under § 994 not be subject to judicial second-guessing. The Judiciary Committee's Report states:

> It is also not intended that the guidelines be subject to appellate review under chapter 7 of title 5. There is ample provision for review of the guidelines by the Congress and the public; no additional review of the guidelines as a whole is either necessary or desirable.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 181 (1983).

Several lower courts have cited this portion of the legislative history to support denials of judicial review of aspects of the Sentencing Commission's rulemaking process. *See, e.g., United States v. Cooper,* 35 F.3d 1248, 1254-55 (8th Cir. 1994); *United States v. Lopez,* 938 F.2d 1293, 1297 (D.C.Cir. 1991).[20] Congress also demonstrated its

[20] Also relevant is the Sentencing Act of 1987, in which Congress amended the provision of the Sentencing Reform Act dealing with departures from the guidelines, 18 U.S.C. § 3553(b), adding the following sentence: "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements and official commentary of the Sentencing Commission." The purpose of this provision is to protect the Sentencing Commission's work from undue judicial scrutiny, such as the burden of Commissioners would face if called to testify in sentencing proceedings around the country to explain the guidelines' resolution of various issues. *See* 133 Cong. Rec. S16647 (1987) (remarks of Sen. Thurmond); 133 Cong. Rec. H10017 (1987) (remarks of Rep. Conyers).

commitment to the Sentencing Commission's protection from excessive judicial scrutiny when it "granted the Commission the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u)." *United States v. Braxton,* 500 U.S. 344, 348 (1991).

Although basing its case on an application of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), the government ignores the language in that case explaining that courts will defer to an agency's implementation of a statute when Congress has explicitly or implicitly delegated such authority. As the Court stated in *Chevron*:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

467 U.S. at 843-44. Thus, "[t]he Commission's exercise of delegated authority is normally lawful as long as it is reasonable." *Melendez v. United States,* 518 U.S. --, 116 S.Ct. 2057, 135 L.Ed.2d 427, 442 (1996) (Breyer, J., with O'Connor, J., concurring and dissenting, citing *United States v. Shabazz,* 933 F.2d 1029, 1035 (D.C. Cir.) (Thomas,

J.), *cert. denied*, 502 U.S. 964 (1991) (applying *Chevron* to uphold challenged sentencing guideline on this basis)).

Chevron's meaning in the present context, as explained by a leading authority on administrative law, is that "When Congress enacts a statute to be administered by an agency, it has delegated to the agency resolution of all policy disputes that arise under that statute that Congress did not itself resolve." 1 Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise ¶3.3, at 114 (3d ed. 1994). Or, as Professor Sunstein has written, according to *Chevron*, "the resolution of ambiguities in statutes is sometimes a question of policy as much as it is one of law, narrowly understood, and that agencies are uniquely well situated to make the relevant policy decisions." Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2086 (1990). This is especially true of the Sentencing Commission, to which Congress recognized it had delegated "extraordinary powers and responsibilities." S.Rep. No. 225, 98th Cong., 2d Sess. 160 (1983).

This Court's unreviewability decisions under the "committed to agency discretion" clause of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), also support the conclusion that the Sentencing Commission's implementation of the policies set forth in § 994 is entitled to great deference. Although as noted above, the judicial review provisions of the APA do not apply to the Sentencing Commission,[21] the logic behind this Court's decisions in this area supports a similar principle here. As

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[21] *Compare* 28 U.S.C. § 994(x) ("notice and comment" rulemaking procedures of the APA, codified at 5 U.S.C. § 553, apply to Sentencing Commission).

this Court discussed in *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), "review is not to be had" in those cases in which the relevant statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." The Court thus held unreviewable an agency's decision not to institute enforcement proceedings. *Id.* at 831.

Likewise, in *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Indian Health Services, an agency within the Department of Health and Human Services, canceled a program that had provided clinical services to handicapped Indian children in the Southwest. This Court deemed the cancellation to be "committed to agency discretion" and therefore not subject to judicial review. The program had been funded from the agency's lump-sum appropriation. The Court noted that "the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way." *Id.* at 192. This is the same purpose underlying the broad congressional grant of authority to the Sentencing Commission. See also *Webster v. Doe*, 486 U.S. 592 (1988) (no judicial review of decision by Director of Central Intelligence to terminate employee in the interests of national security); *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) (no judicial review of agency's refusal to reconsider action because of material error).

The Court in *Heckler v. Chaney* elaborated the rationale for unreviewability in a way that resonates clearly in this case. As the Court explained, judicial review is inappropriate when an agency has engaged in "a complicated

balancing of a number of factors which are peculiarly within its expertise." *Heckler*, 470 U.S. at 831. This is so because the "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.* at 831-32. This is precisely the situation raised by the Sentencing Commission's promulgation of the career offender guideline and Amendment 506. The Sentencing Commission sought to balance a series of complicated factors, namely the various considerations Congress set forth in § 994's provisions. The Sentencing Commission engaged in this task with sensitivity and care, exercising the expertise that Congress anticipated when it established the Commission. As a result, the Sentencing Commission's implementation of Congress's goals expressed in § 994, including the adoption of Amendment 506, is not subject to judicial second-guessing.

Congress delegated to the Sentencing Commission the responsibility to implement and harmonize the diverse provisions of § 994. A Sentencing Commission decision, made after careful reflection on all of the provisions of the Sentencing Reform Act, should not be judicially disturbed if it is "within the bounds of reasoned decisionmaking." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983). It is not necessary in this case, in order to affirm the judgment below, to hold that a court could never invalidate a guideline for failing to comply with a provision contained in § 994.[22] However, a court should not declare any

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[22] Arguably a guideline promulgated in violation of the basic procedural requirements set forth in Section 994 would properly be subject to judicial invalidation. Section 994(a) requires that the affirmative votes of at least four members of the Commission are necessary to adopt or amend guidelines, policy statements, or commentary. Section 994(p) mandates that guidelines or amendments to the guidelines promulgated by the Sentencing Commission be submitted to Congress by May 1, and that such guidelines or amendments may not take effect before Congress has had six months to review the proposals. These provisions do not relate to policy judgments to be made by the Commission.

particular provision of the guidelines invalid where the Commission's design of that section can be defended as reflecting a fair reading and implementation of *all* of the directives in § 994.

D. The Sentencing Commission's Adoption of Amendment 506 Represents a Reasonable Exercise of the Commission's Policy Judgment.

Viewed in the full context of the Commission's task of developing the guidelines, the career offender provision, including Amendment 506, rests well "within the bounds of reasoned decisionmaking," *Baltimore Gas & Electric v. NRDC, supra*, and is therefore valid. The Sentencing Commission carefully prioritized and scrupulously implemented the congressional goals contained in § 994(h) and the other provisions in § 994. The Commission "assured" severe sentences for repeat offenders, while pursuing the overarching goal of reducing unwarranted disparity.

In respondent Hunnewell's case, for example, his actual criminal conduct would have resulted in an offense level of 13, less 2 for "acceptance of responsibility," USSG

§ 3E1.1, for a total of 11, with a resulting guideline range at Criminal History Category VI of 27-33 months. PSI at 7-9, 21. The filing of an information under 21 U.S.C. § 851 drove his maximum statutory sentence up to 30 years, and he was initially sentenced as a "career offender," based on two prior state drug felonies, at Level 31 (34 less 3 for acceptance). The term imposed, 188 months (from a range of 188 to 235 months[23]), is a six-to-seven-fold increase over the ordinary guideline sentence deemed appropriate for his offense, even considering the substantial prior record. Based on USSG § 4B1.1 after its clarification by Amendment 506, the "career offender" level would be 32. Assuming the same 3-level reduction, the resulting sentence at level 29 would come from a range of 151-188 months. Thus, any sentence imposed under the regime of Amendment 506 would exceed 12½ years and could be the same as that previously given.[24] The

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[23] This is the range advocated by the government, apparently on the basis that these sentences, ranging from 52% to 65% of the enhanced, 30-year statutory cap, are "at or near" that maximum, while a range two levels lower is not.

[24] Similarly, with respect to respondent LaBonte, the base offense level was 14. Less two levels for acceptance of responsibility, his guideline range at Criminal History Category IV would have been 21-27 months. Undisputed Findings Affecting Sent., at 1, *U.S. v. LaBonte*, Cr. No. 92-69 (D.Me.); Judgment Exh. A, *id.* As a career offender facing an *enhanced* statutory maximum of 30 years based on the § 851 filing (his predicate offenses being two prior state drug convictions), the range instead was held to be 188-235 months. (He was sentenced to serve 188 months – 52% of the enhanced maximum, the same as Hunnewell.) His sentence was subsequently reduced under 18 U.S.C. § 3582(c)(2), on the basis of Amendment 506, to 151 months, based on a career offender

challenged amendment allows an incremental benefit at best for his category of defendant.

As this Court has recognized, "Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goals, serve as a nudge in the preferred direction." *Rosado v. Wyman*, 397 U.S. 397, 413 (1970). Although the government now challenges the wisdom of the Commission's approach, it is precisely the approach Congress mandated in § 994. The Sentencing Commission faithfully and reasonably fulfilled its responsibilities under § 994, including § 994(h), in adopting Amendment 506.

II. AMENDMENT 506 IS VALID UNDER THE TWO-PART *CHEVRON* TEST MANDATING JUDICIAL DEFERENCE TO AN AGENCY'S PERMISSIBLE CONSTRUCTION OF THE STATUTE IT IS CHARGED WITH IMPLEMENTING.

The court of appeals in this case upheld the validity of Amendment 506 based on an application of the two-part test derived from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the government attacks the First Circuit's judgment solely on the basis of a *Chevron* analysis.[25] As discussed under

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range at level 32, less 3 for acceptance, of 151-188. Pet. Appx. 7a-8a.

[25] As this Court stated in *Chevron*:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two

Point I of this Brief, a proper application of *Chevron* in this case focuses not on the two-part test, but on the affirmative delegation of authority to the Sentencing Commission. By virtue of that broad delegation, the Commission's definition of "offense statutory maximum" is valid simply because it is not unreasonable. At the same time, Amendment 506 is also fully sustainable under the two-part *Chevron* test. Under that test, because Congress's intent in § 994(h) is not entirely clear, and because the Sentencing Commission's understanding of that provision is "permissible" (*Chevron*, 467 U.S. at 843), Amendment 506 is valid.

A. Congress Has Not "Directly Addressed the Precise Question at Issue," that is, Whether the Sentencing Commission Must Base the Career Offender Guideline on Enhanced Statutory Maximum Sentences.

The first question under the *Chevron* test, whether the statutory provision at issue is free from any ambiguity, must be answered in the negative. Section 994(h) provides that "The Commission shall assure that the guidelines specify a term of imprisonment at or near the

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> questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the . . . question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43.

maximum term authorized for categories of defendants in which the defendant is eighteen years old or older" and 1) the defendant stands convicted of a felony that is a crime of violence or a specified controlled substance offense; and 2) the defendant has at least two prior felony convictions for a crime of violence or a specified controlled substance offense. Contrary to the government's argument, the quoted language, properly read, is subject to more than one plausible interpretation. As Justice Scalia has observed:

> If *Chevron* is to have any meaning, then, congressional intent must be regarded as "ambiguous" not just when no interpretation is even marginally better than any other, but rather when two or more reasonable, though not necessarily equally valid, interpretations exist.

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511, 520 (1989). Viewed in this light, the language of § 994(h) is not free from ambiguity.

This Court recently found ambiguity in a statutory provision remarkably similar to § 994(h). At issue in *United States v. R.L.C.*, 503 U.S. 291 (1992), was the meaning of 18 U.S.C. § 5037(c), which provides that the term of detention imposed on a youth found to be a juvenile delinquent may be no longer than "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." The dispute in *R.L.C.* centered on whether the quoted language refers to the statutory maximum adult sentence, or to the top of the guideline range that would have been applicable (absent facts warranting an upward departure) were the

juvenile an adult. The government's position was that § 5037(c) unambiguously refers to the statutory maximum. This Court disagreed, holding that under plain meaning analysis, either interpretation is tenable. 503 U.S. at 297.[26]

The decision in *R.L.C.* establishes that the meaning of "maximum" is not self-evident or unambiguous. This Court has long recognized that the "meaning [of words] well may vary to meet the purposes of the law." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). The petitioner's half-hearted attempt to distinguish *R.L.C.* is unavailing. The government contends that it "would be entirely circular to suggest that the Commission had complied with § 994(h) simply by prescribing sentences 'at or near' the top of the Guidelines range." Pet. Br. 19 n.7. Whether or not that statement is correct, the issue in this case is not whether the Commission could deem "at or near the maximum" to mean at or near the top of the guideline range. Rather, the issue is whether § 994(h) *unambiguously* requires the Sentencing Commission to base the career offender guideline on enhanced statutory maximums which are based on the same prior offenses which trigger the guideline, but which come into play only when the prosecutor in a given case elects to file an information under 21 U.S.C. § 851. The government completely fails to explain how,

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[26] The Court went on to examine the legislative history of the statute, resolving the ambiguity in favor of the interpretation incorporating the applicable guideline range. 503 U.S. at 297-305. Finally, the Court concluded that even if an ambiguity persisted, the rule of lenity would compel "the construction yielding the shorter sentence." *Id.* at 305.

after deeming the phrase "the maximum term of imprisonment that would be authorized" to be ambiguous in *R.L.C.*, this Court could find the phrase "a term of imprisonment at or near the maximum term authorized" to be free from ambiguity. In fact, § 994(h) is equally ambiguous.[27]

The court of appeals in this case identified another source of ambiguity in § 994(h): the relationship between the phrase "maximum term of imprisonment" and the phrase "categories of defendants." Pet. Appx. 14a-24a. The meaning of "maximum" depends upon a construction of "categories." Categories, in this context, can have at least two meanings. One interpretation is that the applicable category of defendants is that group of defendants who have committed similar offenses and against whom the government has sought sentence enhancements. The language of § 994(h), however, suggests that an equally plausible reading is that the applicable category of defendants is all defendants who have committed the same offense and who have the two required prior felony convictions, regardless of whether the government has filed notice of its contention that an enhanced maximum sentence applies.

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[27] See also *United States v. Granderson*, 511 U.S. 39 (1994) ("original sentence," as used in 18 U.S.C. § 3565(a), refers not to the sentence actually imposed on a defendant, but rather to the maximum of the range of imprisonment authorized by the sentencing guidelines). Here, too, a narrowly literal reading of a phrase ("original sentence") does not make sense in the overall context of the legislation.

A sentence "at or near the maximum authorized" under this latter view would refer to the unenhanced maximum. The unenhanced maximum is, in fact, the "maximum term authorized" for the category of defendants who (1) have been convicted of a crime of violence or a narcotics trafficking offense and (2) have at least two prior convictions for such offenses. This is the applicable "category" identified by § 994(h). There are subsets of this category, defendants who are eligible for enhanced maximums and against whom the government has opted to seek such enhancements, who face higher maximum terms of imprisonment *as individuals*. But the *category* designated by § 994(h) is naturally, or at least reasonably, read to include all defendants described in the provision.

The government attempts to demonstrate that there is no ambiguity by contending that the maximum term authorized "is not changed by the government's omission to file the procedural notice required by Section 851(a)(1) in a particular case. . . . " Pet. Br. 21. This is incorrect. A sentence is only "authorized" if the government has charged the defendant in a way which enables the court to impose that sentence. A sentence pursuant to 21 U.S.C. § 841(b) is not "authorized" for an offender convicted of simple possession of a controlled substance under 21 U.S.C. § 844(a), even if the court believes that the defendant actually trafficked in the controlled substance, nor is an enhanced maximum sentence for distribution within a thousand feet of a school "authorized" unless the offense is charged under *id.* § 860. Indeed, the holding and entire rationale of *R.L.C., supra*, refute the government's argument in this regard. For the same reasons, an enhanced

statutory maximum is not "authorized" for the "category" of repeat offenders which includes defendants against whom the government has not filed the required notice.

The government's suggestion in this regard proves too much. If the maximum sentence "authorized" for a recidivist drug law violator does not depend on the filing of a § 851 information, then every case involving a repeat drug offender must be subject to career offender sentencing that is measured by the enhanced maximum. No court has ever adopted that reading of the statute and guideline, the government did not advance that reading of the statute below (indeed, the government does not appear ever to have proposed that reading of the statute previously in any case in any court), and there is no reason at all to suppose that it reflects congressional intent.

The government's reading would effectively rewrite § 994(h) to say that "The Commission shall assure that the guidelines specify a term of imprisonment at or near the maximum authorized *for any defendant* who is eighteen years old or older and. . . . " This reading eviscerates the phrase "categories of defendants" and violates the principle that courts will construe a statute so as to give effect, if possible, to each word or phrase. *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994); *Penna. Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Potter v. United States*, 155 U.S. 438, 446 (1894).

The reference in § 994(h) to "categories" of defendants reflects a significant and recurring theme in the

Sentencing Reform Act. In a variety of provisions Congress instructed the Commission to develop guidelines not for individual defendants, but for categories of defendants. *See* 18 U.S.C. § 3553(a)(4); 28 U.S.C. §§ 994(b)(1), 994(d) and 994(i). The legislative history further demonstrates that the use of "categories" in § 994(h) is critical to its meaning and not some sort of superfluity:

> The bill creates a sentencing guidelines system that is intended to treat all classes of offenses committed by *all categories of offenders* consistently. This approach will *eliminate specialized sentencing statutes that cover narrow classes of offenders*. . . .

S.Rep. No. 225, 98th Cong., 2d Sess. 51 (1983) (emphasis added; footnote omitted). The focus in § 4B1.1 on categories of defendants, rather than on individuals, is also in keeping with Congress's goal of "providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C. § 994(f); see also *id.* § 991(b)(1)(B).

Just as the language of § 994(h) is not free from ambiguity, so, too, the structure of the Sentencing Reform Act does not reveal any congressional intention that § 994(h) require the Sentencing Commission to base career offender sentences on enhanced maximum sentences. The government's theory of this case is tied to a single phrase in § 994(h) read almost entirely out of context. That approach violates the venerable principle that in interpreting a statute, the Court will not be guided by a single sentence or part of a sentence, but rather will "look to the provisions of the whole law, and to its object and policy." *U.S. National Bank of Oregon v. Independent*

Insurance Agents of America, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 8 How. (49 U.S.) 113, 122 (1849)). Accord, *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 19 How. (60 U.S.) 183, 194 (1857)).

As fully explored in Point I of this Brief, the Sentencing Reform Act expresses Congress's intention that the Sentencing Commission exercise judgment in implementing the many directives contained in the Act. Section 994's unexplained, alternating use of the seemingly synonymous terms "assure," "insure" and "ensure" itself helps demonstrate that § 994 is a general roadmap but not a detailed blueprint for a new sentencing system. Instead, § 994 reads like the delicate political compromise it was, flowing from the pens of many authors, resulting in occasional inconsistency and ambiguity. Similarly, the legislative history, while silent on the precise question at issue, supports the conclusion reached by the court of appeals below.

It is not clear, then, whether Congress intended "at or near the maximum term authorized" to refer to the unenhanced or enhanced statutory maximum term of imprisonment.[28] At least, the intended meanings of "maximum term of imprisonment" and the phrase "categories

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[28] In fact, despite the government's protestations, Pet.Br. at 19 n.7, it is not clear that Congress necessarily precluded the Sentencing Commission from interpreting that phrase to refer to the maximum of the applicable guideline range. When the "offense statutory maximum," however defined, is 30 years (360 months), the "career offender" sentencing range under § 4B1.1 is 262-327 months. A judge could therefore impose a "career offender" guideline sentence – regardless of which side prevails in the case now before the Court – that would still be 65 months

of defendants," as used in § 994(h), are not clear.[29] Because Congress has not expressed its intent unambiguously in § 994(h), the second part of the *Chevron* test must be applied.

B. The Sentencing Commission's Interpretation of § 994(h) Is Reasonable.

The career offender guideline, as clarified by Amendment 506, must be sustained. The government does not even contend that Amendment 506 is invalid if § 994(h) is at all ambiguous. Indeed, as detailed in Point I of this Brief, Amendment 506 is eminently reasonable. The Sentencing Commission assured severe sentences for repeat

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(more than five years) below the maximum authorized under the guideline. The Sentencing Commission could have interpreted § 994(h)'s direction that the guidelines call for a sentence "at or near the maximum term authorized," simply to require that the career offender guideline not permit a sentence that far below the top of the range. Of course, no such interpretation is before the Court, but this possible construction does suggest further ambiguity in § 994(h).

[29] If this criminal case did not also involve the action of an administrative agency within the realm of its delegated authority, the Court might look, in the end, to the rule of lenity. See *Bifulco v. United States*, 447 U.S. 381 (1980); *Busic v. United States*, 446 U.S. 398, 406-07 (1980). This Court has never considered how it would resolve a case in which *Chevron* dictated a different result from that suggested by the rule of lenity, nor should it do so here. In this case, the two modes of analysis lead to the same conclusion. *Cf. United States v. R.L.C.*, 503 U.S. 291, 307-08 (1992) (Scalia, J., concurring in the judgment, with Kennedy & Thomas, JJ.) (legislative history should not be invoked to defeat operation of rule of lenity).

offenders, while reducing unwarranted sentencing disparity, lessening the effect of the career offender provision on prison overcrowding, and while complying with the many other directives in § 994. Consequently, under *Chevron*, Amendment 506 is valid, and the judgment of the court of appeals must be affirmed.

III. IF THIS COURT REVERSES THE COURT OF APPEALS, THE CASES SHOULD BE REMANDED FOR RESENTENCING PURSUANT TO 18 U.S.C. § 3553(b).

Amendment 506 does not stand alone. Under *Stinson v. United States*, 508 U.S. 36 (1993), the commentary incorporating that amendment is the Sentencing Commission's authoritative statement of the meaning and intent of USSG § 4B1.1. Thus, § 4B1.1 mandates that the offense level under that guideline be determined based on an offender's unenhanced statutory maximum. If this Court reverses the court of appeals, it will be holding that, at least as applied to offenders subject to enhanced maximums, the guideline, not simply the amended definitional commentary, is invalid.

With no valid guideline in place, respondents would be entitled to be resentenced under the provision of the Sentencing Reform Act which provides, in pertinent part:

> In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of

> the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. § 3553(b). Under this provision, the net result would probably be a sentence in compliance with Amendment 506, as written, or a downward departure therefrom under USSG § 4A1.3 (p.s.). That decision would have to be made by the district court, after hearing appropriate arguments of counsel and allocution of the respondents.

Therefore, if the judgment below is reversed, a remand for resentencing pursuant to § 3553(b) would be necessary.

CONCLUSION

For all of these reasons, Amendment 506 must not be judicially invalidated. The judgment of the United States Court of Appeals for the First Circuit should be affirmed. Respondent LaBonte's sentence should be affirmed, while the cases of Respondents Dyer and Hunnewell should be remanded for possible resentencing.

Respectfully submitted,

On the Brief:
DAVID N. YELLEN

MICHAEL C. BOURBEAU
Attorney for Alfred Hunnewell
JOHN A. CIRALDO
Attorney for George LaBonte
PETER GOLDBERGER
Attorney for Stephen Dyer

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